

**OPINION  
75-212**

August 29, 1975 (OPINION)

Mr. Bronald Thompson  
Chairman, Workmen's Compensation Bureau  
State Capitol Building  
Bismarck, ND 58505

Dear Mr. Thompson:

This is in reply to your letter of August 14, 1975, relative to federal matching funds for occupational safety and health under the Occupational Safety and Health Act of 1970 (Pub. L. 91-596).

You state the following facts and questions:

"It has been brought to my attention of this department that certain federal matching funds may be available to the state in the area of occupational safety and health under the Occupational Safety and Health Act of 1970 (Pub. L. 91-596).

Specifically, these funds may be available for:

1. The enforcement of occupational safety and health standards which would be equally as effective as existing federal standards for the employees of the state and its political subdivisions; and/or
2. The furnishing of consultation services to the employees of this state regarding the federal occupational safety and health law and standards.

"It would be required that a formal application and plan be presented to the Federal Government under 18 b. If approved, the federal funding would be available on a fifty percent basis under 23 (g) of the above act.

"The time and effort required for such an application and plan would be considerable and, therefore, in light of your opinion of May 4, 1973, your opinion is hereby requested as to whether or not:

1. The Workmen's Compensation Bureau can legally expend time and effort in the application and development of a plan to obtain such a grant.
2. The federal funds, if so granted, could be appropriated to the Workmen's Compensation Bureau by the Emergency Commission.

"It should be noted that the two functions involved are areas in which the Federal Government cannot perform (see Section 3 (5) OSHA and 29 CFR 1908 and Program Directive 72-27 and 74-13 OSHA) and in which the state, through the State Safety Engineer, has legally and traditionally worked for many years.

It is the position of the Workmen's Compensation Bureau Legal Counsel that if the Workmen's Compensation Bureau is able to accept this federal grant, the necessary rule and procedural changes can be made under the existing workmen's compensation law, namely Chapters 65-03 and 65-11, N.D.C.C."

Our opinion of May 4, 1975, addressed to Governor Link, indicated that the Emergency Commission could not grant the Bureau the authority to accept federal funds for state administration of OSHA because of the provisions of Section 54-16-04.1 and the actions of the 1973 Legislative Assembly.

Section 54-16-04.1 provided:

"\* \* \*The emergency commission with the advice and counsel of the executive office of the budget may authorize the state treasurer to receive, between legislative sessions, any moneys for new programs not appropriated by the legislative assembly that are made available by the federal government, or any agency thereof, which the legislative assembly has not indicated an intent to reject. The emergency commission may authorize any state agency, department, board or institution to expend such moneys from the date such moneys become available until July first following the next regular legislative session.\* \* \*"

That provision has not been amended.

The 1973 Legislature indefinitely postponed Senate Bill 2115 which would have authorized the Bureau to implement OSHA and we concluded the Emergency Commission could not thereafter authorize the Bureau to further accept and expend federal funds for continuing planning and administration of OSHA. We further noted the adoption of House Concurrent Resolution 3074 providing for the Legislative Council to study the feasibility of state administration of OSHA. That study was completed during the biennium between the 1973 and 1975 biennium. The report of the Legislative Council on this matter is found on pages 100-101 of the 1975 Report of the Legislative Council. The last sentence of that report reads as follows: "Therefore, the Committee makes no recommendation for state implementation of the Federal Occupational Safety and Health Act, and goes on record as being opposed to state implementation of the Act.

One of the reasons for the conclusion of the Council is summarized on page 101 of the report as follows:

"Testimony presented to the Committee indicated that even under state implementation of OSHA, there would be a constant revision of state regulations and standards to comply with federal regulations and standards as promulgated and revised by the U.S. Department of Labor. In addition, any criticism of regulations promulgated by the State in order to comply with federal requirements would be unduly directed towards the state administering agency, where, in fact, the regulations and standards would be primarily established by the U.S. Department of Labor."

Thus it seems rather clear that the Legislature has evidenced its intent to reject state participation in OSHA. The funds available for point one listed in your letter would appear to be subject to the same legislative objections noted above. While point two is somewhat different in that it involves counseling only, we are unaware of any statutory provision which would authorize the Bureau to undertake such a project.

More important in this instance, perhaps, is the fact that federal funds are to be budgeted and appropriated, and Section 54-16-04.1 is, by its own terms, applicable only to moneys "for new programs not appropriated by the legislative assembly that are made available by the federal government, or any agency thereof, which the legislature has not indicated an intent to reject." Those new programs are obviously those programs arising between legislative sessions. While your letter does not so state, it is our impression that the moneys available now are not for "new programs" arising between legislative sessions. In order for the moneys to be for "new programs" arising between legislative sessions, the moneys would have had to become available subsequent to the adjournment of the 1975 Legislative Assembly. If they were available before that time, they should have been requested as part of the Budget of the Bureau. In either case, it would not appear the moneys could be available to the Bureau without legislative approval.

In direct response to your questions:

1. It is our opinion that the Workmen's Compensation Bureau cannot legally expend time and effort in the application and development of a plan to obtain a grant as outlined in your letter since the Bureau would be without authority to implement a program under such a grant.
2. It is our opinion that federal funds, if so granted, could not be appropriated to the Workmen's Compensation Bureau by the Emergency Commission.

Sincerely,

ALLEN I. OLSON

Attorney General